No. 06-901

Supreme Court, U.S.
FILED
FEB 15 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVE GOETZ, Commissioner, Tennessee Department of Finance and Administration, et al.,

Petitioners,

v.

JOHN B., by his next friend, L.A., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONERS

ROBERT E. COOPER, JR.
Attorney General and Reporter
LINDA A. ROSS
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-1771

CHARLES J. COOPER
Counsel of Record
MICHAEL W. KIRK
BRIAN S. KOUKOUTCHOS
DEREK L. SHAFFER
COOPER & KIRK, PLLC
555 Eleventh Street, N.W., Suite 750
Washington, D.C. 20004
(202) 220-9600

Counsel for Petitioners

February 16, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

PETITIONERS' REPLY BRIEF 1

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Berger v. United States, 255 U.S. 22 (1921) 10

Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003) 10

Edgar v. K.L., 93 F.3d 256 (7th Cir. 1996) 7, 8, 9

In re Aetna Casualty and Surety Co., 919 F.2d 1136 (6th Cir. 1990) 10

In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004) 8, 9

In re Kempthorne, 449 F.3d 1265 (D.C. Cir. 2006) 5, 9

In re Kensington Int'l Ltd., 368 F.3d 289 (3d Cir. 2004) 7, 9

In re Kensington Int'l Ltd., 353 F.3d 211 (3d Cir. 2003) 9

United States v. Towns, 913 F.2d 434 (7th Cir. 1990) 10

OTHER

Code of Conduct for United States Judges (2004 ed.) 7

The Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice* (Sept. 2006) 9

FED. R. CIV. P. 53 6

PETITIONERS' REPLY BRIEF

The Brief in Opposition confirms the extraordinary nature of this case. For all of Respondents' pleas about "specific factual findings" below, Opp. 15, *see* Opp. 8, 14, they cannot deny that the court of appeals based its legal ruling on precisely the same facts on which Petitioners rely in this Court. Specifically, the court below did not question Petitioners' showing that the court-appointed "technical advisors" were either actually or apparently biased, nor did it deny that these judicially appointed officers and the fruits of their substantive *ex parte* collaboration with the now-recused district court judge would continue to influence the course of proceedings; it simply held as a matter of law that nothing could be amiss with any of this.

The relevant facts, drawn directly from the record in the district court, remain undisputed.

The members of the OSM conferred with Respondents and unnamed "concerned advocates" over many months and then relayed partisan concerns to Judge Nixon *ex parte*, ultimately proposing findings of noncompliance and a sweeping injunction against Petitioners; Judge Nixon adopted the proposed findings and provisionally adopted the injunctive relief wholesale in his order of October 2004; all of this occurred unbeknownst to Petitioners, who were afforded no notice or opportunity to respond before Judge Nixon issued his order. *See* Pet. 4-6, App. 24a-69a. Although Judge Nixon later recused himself, the OSM members were reappointed by Judge Haynes to "perform the same duties," Pet. 8, App. 4a, to ensure that their "acquired knowledge" would continue to guide the proceedings. App. 100a, 112a; *see also* Opp. 5 ("Judge Haynes . . . explained that the retention of the technical advisors was necessary because he 'did not want to lose the . . . acquired knowledge that they have accumulated in their work.'"). Judge Haynes is now considering the judicial relief proposed by the OSM – notwithstanding that it was vacated by Judge Nixon – while foreclosing inquiry into the *ex parte* communications that generated that proposal. *See*

Pet. 7-9, 15; App. 13a, 133a-34a, 138a. This is occurring despite Petitioners' showing that the members of OSM, now serving as the court's "technical advisors," demonstrated bias warranting their disqualification (or at least discovery) prior to October 2004. *See* Pet. 6-9, 14-16.

The Sixth Circuit looked at these facts and summarily disposed of the matter via unpublished order, just as Respondents say. Opp. 6, 12. Its rationale is the same one advanced by Respondents – *the federal courts should be indifferent* to (i) whether these judicially-appointed officers are, in actuality or appearance, biased partisans, and (ii) whether such officers' tainted work is relied upon by a district court. The split between the Sixth and D.C. Circuits could not be starker. *See* Pet. 10-11, 17. Respondents, without even citing the D.C. Circuit's analysis, say nothing meaningful to the contrary. *See* Opp. 11.

Even were there no circuit split, however, exercise of this Court's supervisory authority would be warranted. The decision below has troubling implications for the integrity of the judicial process in the federal courts. It ignores the revelations that led to the recusal of Judge Nixon and that show bias on the part of the officers whom Judge Haynes has now reappointed and whose proposals he has seized upon. As disquieting as such complacency would be in any case, it is all the more damaging here because this case is so prominent in the public eye – something Respondents, again, do not dispute. *See* Pet. 14, 18.

1. The thrust of the Opposition is that all this should be left to the discretion of the courts below. This is but the latest installment in Respondents' campaign, dating to October 2004, to fend off meaningful inquiry into the OSM's *ex parte* communications. Let us briefly review the maneuvers that occurred below:

- When Petitioners, upon learning of the *substantive ex parte* contacts from Judge Nixon's October 22, 2004 order, moved for discovery into the contacts, Respondents moved immediately "to Temporarily Suspend

Proceedings." *See* App. 22a-23a. Judge Nixon granted that suspension the next day over Petitioners' objection. *See* Pet. 7.

- When the suspension was about to expire in January 2005, Respondents moved for *renewed* suspension, which Judge Nixon effectively granted via inaction, *see* Pet. 7, even "while [he] determined issues raised in a companion TennCare case." Opp. 4. Thus Judge Nixon held this case in abeyance for *more than a year* at Respondents' behest and over Petitioners' objections.[1]
- When Judge Nixon finally reopened the case in November 2005, *Respondents* moved to have the October 2004 order vacated in order to obviate further inquiry into the *ex parte* communications. *See* Pet. 7, 19a.[2]
- When Judge Nixon vacated his order in December 2005, he denied Petitioners' motion for discovery into the *ex parte* communications as moot. Only when Petitioners renewed that motion did he finally recuse himself in *February 2006* (15 months after Petitioners' November 2004 motion). *See* Pet. 1, App. 17a-21a.
- When Judge Haynes assumed control of the case, he decided within a week to retain the

---

[1] Respondents' complaint that Petitioners seek "to further protract" this litigation, Opp. 12, thus comes with irony and poor grace. Since October 2004, it is *Respondents* who have interposed obstruction and delay while Petitioners struggled to have the questions raised by the OSM's *ex parte* contacts resolved so that full and fair proceedings might resume apace.

[2] Respondents' account that the parties *jointly* proposed vacatur of the October 2004 order is misleading. Opp. 4. Petitioners opposed the order and its invasive relief from the moment it was issued, and would have gladly welcomed its vacatur at any point. But vacatur came about only when Respondents relinquished their victory for the express purpose of preventing inquiry into the *ex parte* communications.

members of the OSM, renaming them as "technical advisors," who would (i) "perform the same duties" as they did previously, Pet. 8, App. 4a, (ii) continue to contribute their "acquired knowledge" to the case, Pet. 8, App. 100a, 112a, Opp. 5, and (iii) inform his consideration of the same judicial relief they had formulated *ex parte* with Judge Nixon. *See* Pet. 8-9, App. 8a-9a, 13a, 133a-34a, 138a. At the same time, Judge Haynes foreclosed any inquiry into the *ex parte* communications and bias of the so-called "technical advisors." *See* Pet. 9, App. 13a, Opp. 6.

- When Petitioners, for lack of any other recourse, sought a writ of mandamus directing disqualification or at least targeted discovery, the Sixth Circuit summarily disposed of their petition with the single paragraph set forth at App. 3a. That reasoning boils down to the propositions that (i) there has been no showing that the relevant individuals "were or are acting in a quasi-judicial capacity" so as to be subject to any prohibition against judicial bias, and (ii) any fruits of those individuals' bias and conduct *ex parte* in the form of adverse findings and proposed judicial relief are simply "matters . . . of record [that] can be litigated by the parties." App. 3a.

Much is properly entrusted to "the lower courts' exercise of their discretionary duties." Opp. 8. But this matter no longer should be. The questions presented are in need of answer by this Court.

2. As to the questions presented (or rather, one of them, for Respondents *ignore* the second), Respondents say that we have "grossly mischaracterize[d]" the decision below. Opp. 9, 12. But their rhetoric is unadorned by any analysis of what the Sixth Circuit actually held. In full view of the undisputed facts that the newly christened "technical advisors," had, while serving as Judge Nixon's

OSM, conferred privately with Respondents' counsel and "concerned advocates" and had proposed adverse findings and judicial relief, the Sixth Circuit found no demonstration that "they *were* or are acting in a quasi-judicial capacity." App. 3a (emphasis added).

Respondents now blow past the critical "were" part of that disjunctive, even as they go on to acknowledge – as Judge Haynes did – that "*the former special master was acting 'in a quasi-judicial capacity' when he prepared the proposed remedial plan and the report.*" Opp. 10 (emphasis added); *see also* App. 103a, 127a. That is *dispositive*: Contrary to the Sixth Circuit's account, the individual members of the OSM plainly "*were* . . . acting in a quasi-judicial capacity," which *did* render them subject to the prohibition against bias. The OSM members were subject to disqualification at *that* time; and, to the extent that the *ex parte* communications of 2004 revealed impermissible bias, the OSM's service and work product (in the form of the proposed findings and relief adopted in the October 2004 order) from that point forward were *ultra vires* and should be extirpated. *See In re Kempthorne*, 449 F.3d 1265, 1271 (D.C. Cir. 2006).[3] The Sixth Circuit plainly erred in blinding itself, as a matter of law, to Petitioners' showing of bias on the part of the former OSM members while they were shaping this case.

Moreover, Respondents elide the reality of the present – that the former members of OSM now continue their

[3] Respondents' acknowledgement that the OSM was indeed filling a quasi-judicial function at the time of the *ex parte* communications makes it impossible to reconcile the Sixth Circuit's decision with *Kempthorne*. Whereas the Sixth Circuit has permitted OSM's proposed findings and judicial relief to remain matters of record to "be litigated by the parties," without regard for any bias, App. 3a, *Kempthorne* held that "any such work product" must be extirpated without delay, because "only suppression can ensure that neither [Respondents] nor the district court will rely upon the reports in the future, to the detriment of the public's confidence in the judicial process." 449 F.3d at 1271 (internal quotation omitted).

same role under the title of "technical advisors." Judge Haynes is preserving their quasi-judicial function and the fruits of it. He has expressly prescribed that they shall "*perform the same duties*." Pet. 8, App. 4a (emphasis added). He has ensured that the knowledge OSM "acquired" in conferring privately both with Respondents' counsel and then with Judge Nixon will continue to guide the proceedings. App. 100a, 112a; *see also* Opp. 5. And he has seized upon the very judicial relief the OSM formulated *ex parte* with Judge Nixon as the object of further proceedings. *See* Pet. 8-9, App. 8a-9a, 13a, 133a-34a, 138a. Thus the same court advisors have been reappointed to waddle like ducks and to quack like ducks, just as they did before; they are simply no longer to be *called* "ducks." Surely the integrity of the federal judiciary requires more.

Far from denying this, Respondents embrace the proposition that a "technical advisor" performing these functions *can indeed be biased*. *See* Opp. 10. Such a rule permitting partisan bias on the part of such judicial advisors is without precedent. *See* Pet. 12-13.

3. Respondents insist that there is nothing "to support [Petitioners'] allegation that the *ex parte* communication between Judge Nixon and the former special master was improper in the first place." Opp. 13. Respondents thus simply whistle past our showing in the Petition that the *ex parte* communications concerned the merits of the case and thereby violated the governing orders in this case, the federal rules, and the canons of ethics:

- Judge Nixon's orders authorized confidential substantive *ex parte* communications *only* with the parties – *not* the court. *See* Pet. 4 n.1, 14; App. 78a-79a.
- Judge Nixon confirmed that his orders foreclosed the OSM from communicating with the court on disputed merits issues. *See* Pet. 4 n.1; App. 74a-75a.
- FEDERAL RULE OF CIVIL PROCEDURE 53 warns against *ex parte* communications between

special master and district court.[4] *See* Pet. 4 n.1; App. 91a.

- Canon 3, § A(4) of the *Code of Conduct for United States Judges* (2004 ed.), as also applicable to a special master, prohibits substantive *ex parte* communications. *See* Pet. 12.
- Courts have consistently held substantive *ex parte* communications to be illicit. *See* Pet. 12; *Edgar v. K.L.*, 93 F.3d 256, 258 (7th Cir. 1996); *In re Kensington, Int'l, Ltd.*, 368 F.3d 289, 309-12 (3d Cir. 2004).

Beyond this facial impropriety, Respondents fail to grapple with the facts that the OSM's substantive *ex parte* contacts with Judge Nixon (i) expressly relayed the concerns of still-unnamed "concerned advocates"; (ii) occurred in conjunction with the OSM's *ex parte* substantive communications with Respondents' counsel; (iii) featured submissions by the OSM's Sara Rosenbaum, whom *Respondents themselves* had previously retained their expert *in this very case*; and (iv) resulted in a proposal for breathtakingly invasive relief (which the Respondents never address) that reads as though it had been written by Respondents themselves. *See* Pet. 14-15; App. 33a-69a, 158a-59a, 198a. If more is required to make out impropriety amounting to an appearance (at least) of bias, then surely discovery – which we have sought but been denied since November 2004 – is warranted to dispel any doubt about the integrity of this proceeding.

---

[4] Although Respondents observe that Rule 53 was amended in relevant part after Judge Nixon's 2002 appointment order, the amended version applies "insofar as just and practicable, [in] all proceedings . . . pending" on December 1, 2003. Order of the Supreme Court (March 27, 2003). Moreover, Judge Nixon's earlier order, in excluding *ex parte* communications between court and special master, was entirely consistent with the subsequent amendment, which merely codified preexisting precepts from the *Code of Conduct for United States Judges*.

4. Respondents assert that it was "a matter of public record" prior to October 2004 that Judge Nixon had been receiving such *ex parte* input from the OSM. *See* Opp. at 3. But the only support Respondents offer is a transcript passage where Judge Haynes made a similar assertion. *See* Pet. App. 99a. Neither Judge Haynes nor Respondents have cited anything to support this. The only *ex parte* communications of which Petitioners were aware concerned (or were thought to concern) purely *administrative*, not *substantive*, matters, rendering them entirely benign. Not until issuance of the October 2004 order did Petitioners learn that *substantive ex parte* communications – *i.e.*, communications concerning the underlying merits of the case – had transpired. Only those *substantive* communications were forbidden. *See In re Brooks*, 383 F.3d 1036, 1044 (D.C. Cir. 2004) (communications between court and special master did not give rise to legitimate concern where "those contacts were of a procedural and not a substantive nature"); *Edgar*, 93 F.3d at 257-58 (meaningful revelation did not occur until defendants learned that *ex parte* communication between court and expert had "covered the merits of the case," where prior communications had been "administrative and 'social.'"). Indeed, *Respondents* themselves requested vacatur of Judge Nixon's order proposing sweeping relief in their favor and Judge Nixon recused himself in the wake of the October 2004 revelations without *anyone* hinting that Petitioners might have waived the instant concerns. Respondents' notion of waiver was not credited below and has been contrived to thwart further inquiry.

5. Unable to defend the substance of the decision below, Respondents attempt to deny its import, suggesting that the advent of Judge Haynes and his appointment of several additional advisors cures any conceivable harm. *See* Opp. 14-15. Nonsense. The ruling below is perpetuating the role of the OSM advisors and their handiwork, and

thereby perpetuating the taint they impose on these proceedings. *See* Pet. 7-9, 15. Thus, far from rooting out the seeds of any bias, the district court, unrestrained by the Sixth Circuit, is actively cultivating them. As for the new monitors, Judge Haynes has specifically instructed them (over Petitioners' objections) to *confer* with the former members of the OSM, so that the OSM's "acquired" knowledge (precisely what is of concern to Petitioners) will thereby be preserved. *See* App. 5a, 7a, 100a, 112a.[5]

6. Respondents note that the decision below is unpublished. *See* Opp. 12. That is noteworthy indeed. Petitioners know of no other court of appeals that has deemed its disposition of a mandamus petition concerning bias and substantive *ex parte* communications on the part of judicial officers unworthy of publication. The courts of appeals have uniformly accorded such petitions careful treatment for the benefit of the Federal Reports. *See*, *e.g.*, *Kempthorne*, 449 F.3d 1265; *In re Brooks*, 383 F.3d 1036; *In re Kensington Int'l Ltd.*, 353 F.3d 211 (3d Cir. 2003); *In re Kensington Int'l Ltd.*, 368 F.3d 289; *Edgar*, 93 F.3d 256. The Sixth Circuit's unpublished treatment hardly squares with the compelling public and institutional interest in conducting full and fair inquiry into any serious question of judicial misconduct. *See* The Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*, at 1-2, 5 (Sept. 2006).

7. Respondents also note that this case is interlocutory and arrives by way of a mandamus petition. *See* Opp. 12, 14, 16. That is no more noteworthy than is the fact that this case concerns bias on the part of judicial officers who are actively influencing the proceedings below. Writs of mandamus (which are, by definition, interlocutory) are

---

[5] Although Respondents state that Judge Haynes set an evidentiary hearing for "June 19, 2006," Opp. 5, it in fact was postponed and has yet to be held.

the appropriate vehicles for addressing such issues and directing recusals, as courts have always noted. *See, e.g.*, *In re Aetna Cas. and Sur. Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (en banc) (quoting *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1025 (9th Cir. 1982)); *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) (quoting *Berger v. United States*, 255 U.S. 22, 36, 65 (1921)).[6] This Court itself has explained why this is so: "The remedy by appeal is inadequate. It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious." *Berger v. United States*, 255 U.S. 22, 36 (1921). Therefore, to the extent this Court would exercise its supervisory power to combat this particular "evil," it can, as a practical matter, do so only in this posture.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set for plenary review. Alternatively, the decision below should be summarily reversed.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General and Reporter
LINDA A. ROSS
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-1771

CHARLES J. COOPER
Counsel of Record
MICHAEL W. KIRK
BRIAN S. KOUKOUTCHOS
DEREK L. SHAFFER
COOPER & KIRK, PLLC
555 Eleventh Street, N.W., Suite 750
Washington, D.C. 20004
(202) 220-9600

Counsel for Petitioners

[6] Indeed, at least one court of appeal *insists* that any such concern be promptly raised via writ of mandamus, or else it is waived. *See United States v. Towns*, 913 F.2d 434, 443 (7th Cir. 1990) (citing cases).